



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 11 | Number 1

Article 12

Winter 1986

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Recommended Citation

John D. Shugrue, *Dracos v. Hellenic Lines Ltd.: The Burden of Proof and Offensive Collateral Estoppel*, 11 N.C. J. INT'L L. & COM. REG. 147 (1986).

Available at: <http://scholarship.law.unc.edu/ncilj/vol11/iss1/12>

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Dracos v. Hellenic Lines Ltd.: The Burden of Proof and Offensive Collateral Estoppel

In *Dracos v. Hellenic Lines Ltd.*¹ the Fourth Circuit Court of Appeals was confronted with the problem of deciding the collateral estoppel² effect of facts found to be determinative of the choice of law issue in a prior action in maritime tort.³ The court also had to determine the proper method of deciding the collateral estoppel question, particularly in terms of allocating the burden of proof.⁴ Finding that the business operation of the defendant was inherently subject to changes in circumstances which could affect the choice of law, the court held that the prior decision⁵ did not serve to preclude defendant from relitigating that issue because plaintiff had failed to meet her burden of proving that the earlier decision should be accorded collateral estoppel effect.⁶ *Dracos* thus raises important questions about the offensive use of collateral estoppel in the federal courts.

Nicholas Dracos, chief engineer of the M/V HELLENIC STAR, was found dead aboard ship on May 14, 1977, while the ship was berthed in Norfolk, Virginia.⁷ Maria Dracos, Nicholas' wife and the administratrix of his estate, sued Hellenic Lines Ltd., owner of the STAR and Nicholas' employer, in the United States District Court for the Eastern District of Virginia. Mrs. Dracos based her claim on provisions of the Jones Act⁸ and on "general maritime law."⁹

¹ 762 F.2d 348 (4th Cir. 1985) (en banc).

² "The doctrine of res judicata prohibits a party from relitigating the same claim in a subsequent suit on the same cause of action, while collateral estoppel . . . prohibits a party from retrying a previously tried issue in a subsequent suit on a different cause of action." Note, *Alternative Grounds in Collateral Estoppel*, 17 Loy. L.A.L. Rev. 1085, 1085 (1984).

³ *Dracos*, 762 F.2d at 349.

⁴ *Id.* at 350, 352.

⁵ *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

⁶ *Dracos*, 762 F.2d at 352-53.

⁷ *Id.* at 350.

⁸ 46 U.S.C. § 688 (1982) provides:

Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law [in United States federal courts] . . . and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law [in United States federal courts]

Id. Although seemingly unconditional in its grant of a U.S. forum to injured seamen, the Jones Act has been construed as having inherent limitations:

But Congress . . . wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping.

Hellenic contended throughout the district court proceeding that the law of the United States did not apply and therefore the court lacked jurisdiction to try the case. Hellenic argued that Greek law governed the dispute¹⁰ because Hellenic was incorporated in Greece, the Dracos' were both Greek citizens, and the employment contract between Nicholas Dracos and Hellenic provided that "Greek law in Greek courts [would] control the rights and liabilities arising from the employment relationship."¹¹

After a jury verdict for the plaintiff, defendant filed a motion for judgment notwithstanding the verdict. In considering this motion the court "concluded that neither federal law nor general maritime law of the U.S. applied" and therefore the court was without jurisdiction.¹²

On appeal to the Fourth Circuit, two issues were considered on rehearing en banc.¹³ First, the court examined the question of the applicability of U.S. law to the case. The court used two Supreme Court decisions which set forth nine factors to be examined when considering the applicability of U.S. law in a maritime tort context. In *Lauritzen v. Larsen*¹⁴ the Supreme Court enumerated seven factors which impact on the choice of law:

- (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured seaman, (4) the allegiance of the defendant shipowner, (5) the place of the execution of the employment contract, (6) the inaccessibility of the foreign forum, and (7) the law of the forum.¹⁵

All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to . . . reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations. . . .

By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.

Lauritzen v. Larsen, 345 U.S. 571, 577 (1952). The Jones Act thus has been held to confer on federal courts the right to provide a remedy only when certain criteria are met. See *infra* note 15 and accompanying text.

⁹ *Dracos*, 762 F.2d at 350.

¹⁰ *Id.*

¹¹ *Id.* at 351.

¹² *Id.* at 350.

¹³ In *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392 (4th Cir. 1983), the court of appeals affirmed the district court's decision and issued a majority opinion which virtually is identical to the opinion issued by the court after a rehearing en banc. *Dracos*, 762 F.2d at 348. The dissent of Judge Murnaghan was not reproduced in the second opinion, but the judge referred to his earlier opinion and advanced additional arguments against the en banc majority opinion. *Id.* at 353-54 (Murnaghan, J., dissenting).

¹⁴ 345 U.S. 571 (1952).

¹⁵ *Dracos*, 762 F.2d at 351. See *Lauritzen*, 345 U.S. at 583-91. Applying these factors, the Court found that the parties were "both Danish subjects, the events took place on a Danish ship not within territorial waters" of the United States, and the contract of employment specified that Danish law would govern disputes arising from the employment relationship. Weighing this evidence against the fact that the employment contract was signed

In *Hellenic Lines Ltd. v. Rhoditis*¹⁶ the Court emphasized that the *Lauritzen* criteria were neither mechanical in their application nor exhaustive in their scope, and two additional factors were set forth: the shipowner's "base of operations" and his "operational contacts" with the United States.¹⁷

Applying these criteria to *Dracos*, the court of appeals found that only two "relatively unimportant" factors, the place of the tort and the law of the forum, favored the application of U.S. law.¹⁸ An examination of the remaining factors pointed to the appropriateness of applying Greek law.¹⁹ The court thus held that the district court had not erred in concluding that U.S. law did not govern the action and therefore the court lacked competency to decide the case.²⁰

Additionally, the court of appeals considered the collateral estoppel effect of a determination in *Rhoditis* that Hellenic was in fact amenable to suit in U.S. courts by way of a Jones Act proceeding.²¹ In *Rhoditis* the Court found that Hellenic's owner, Pericles Callimaniopoulos, had resided in the United States for twenty-five years, that Hellenic's base of operations was in the United States, and that Hellenic had extensive business contacts with the United States. These factors rendered U.S. law appropriate and subjected Hellenic to liability under the Jones Act.²² The court in *Dracos*, however, refused to allow plaintiff to use *Rhoditis* as collateral estoppel to prevent defendant from relitigating the choice of law issue, holding that the district court had not abused its discretionary authority in not giving *Rhoditis* this preclusive effect.²³

in New York and that service on defendant was made there, the Court concluded that the Jones Act was not applicable. *Id.* at 592-93.

¹⁶ 398 U.S. 306 (1970).

¹⁷ *Id.* at 308-10. The Court found that although the seaman was Greek, the employer was a Greek corporation, and the employment contract was executed in Greece, these factors were "minor weights in the scales compared with the substantial and continuing contacts" with the United States of the defendant corporation. Defendant Hellenic was thus held subject to Jones Act liability. *Id.* at 310.

¹⁸ *Dracos*, 762 F.2d at 351. There has been some disagreement concerning the relative importance of the place of the tort. Some courts have, contrary to the court in *Dracos*, characterized this factor as a significant one in the choice of law determination. *E.g.*, *Papaioannoiu v. Hellenic Lines, Ltd.*, 569 F. Supp. 724, 728 (E.D. Pa. 1983). *Contra Ullah v. Canion Shipping Co.*, 589 F. Supp. 552, 556 (D. Md. 1984), *aff'd*, 755 F.2d 1116 (4th Cir. 1985).

¹⁹ *Dracos*, 762 F.2d at 351-52.

The defendant shipowner and employer was a Greek corporation. Its vessels flew the Greek flag and were registered under Greek law. Both the plaintiff and her husband were Greek citizens and domiciliaries. The contract of employment between Nicholas Dracos and the defendant was drafted and executed in Greece . . . Maria Dracos had remedies available in a Greek court had she chosen to seek them.

Id. at 351.

²⁰ *Id.* at 351-52.

²¹ *Id.* at 352-53. *See supra* note 17.

²² *Rhoditis*, 398 U.S. at 309-10.

²³ *Dracos*, 762 F.2d at 352-53.

A brief examination of the emergence of the offensive use of collateral estoppel will prove helpful in analyzing the court's decision in *Dracos*. Collateral estoppel, or "issue preclusion," was limited initially by the doctrine of mutuality. Under this doctrine the party asserting the estoppel and the party to be estopped had to have been parties in or privies to the previous action.²⁴ To better promote the goals of collateral estoppel²⁵ and to eliminate a rule generally viewed as outmoded and unjustified,²⁶ however, courts began to loosen or entirely reject the requirement of mutuality.²⁷

The federal courts formally discarded the doctrine of mutuality in *Blonder-Tongue Laboratories v. University of Illinois Foundation*.²⁸ The Court in that case sanctioned the *defensive* use of collateral estoppel, allowing the defendant "to estop the relitigation of an issue that the plaintiff had already unsuccessfully litigated in a suit against another defendant."²⁹ Such use of estoppel by a defendant not a party to the prior litigation would, the Court believed, improve the allocation of judicial resources by giving plaintiffs an incentive to join all possible defendants in the initial action and thereby prevent piecemeal litigation of the same issue.³⁰

In *Parklane Hosiery Co. v. Shore*³¹ the Court took the doctrine of nonmutual collateral estoppel one step further by holding that a *plaintiff* could, under certain circumstances, use a prior decision *offensively* to estop a defendant from relitigating an issue that defendant had lost in prior litigation in which the plaintiff was not a party.³² In approving the use of offensive collateral estoppel, however, the Court was quick to recognize the potential for abuse. The Court noted that, unlike defensive collateral estoppel, offensive collateral estoppel gave possible plaintiffs a disincentive to join in an ongoing action in which they might have an interest. Instead, potential plaintiffs might be tempted to "wait and see" how the litigation was resolved in the hopes of asserting a decision favorable to them as collateral estoppel in a later suit brought on their behalf.³³

Further, the Court constructed a number of scenarios in which application of collateral estoppel offensively might prove unfair to

²⁴ See *Cromwell v. County of Sac.*, 94 U.S. 351 (1876).

²⁵ "Regardless of how phrased, the claimed benefits of . . . [issue] preclusion, may be reduced to two primary and interrelated goals, efficiency and consistency." Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 ARIZ. ST. L.J. 45, 49.

²⁶ *Bernhard v. Bank of America*, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942).

²⁷ *Id.* Justice Traynor found that the doctrine had been virtually excepted to death in many jurisdictions, thus making outright rejection of the mutuality requirement a less than revolutionary move. *Id.*

²⁸ 402 U.S. 313 (1971).

²⁹ *Dracos*, 762 F.2d at 352.

³⁰ *Blonder-Tongue*, 402 U.S. at 328-29.

³¹ 439 U.S. 322 (1979).

³² *Id.* at 331-32.

³³ *Id.* at 329-30.

the defendant. For instance, in cases where the defendant lacked the incentive to litigate the first action fully and vigorously, or where the defendant has available in the second action procedural opportunities not available in the first action, there would be attendant unfairness in allowing a plaintiff to use collateral estoppel offensively.³⁴

These potential shortcomings notwithstanding, the Court approved the offensive use of estoppel subject to a grant of broad discretion to trial courts in deciding when application of the doctrine would be appropriate.³⁵ In exercising this discretion, courts have examined exactly what was litigated in the prior action, the "sufficiency of the prior litigation,"³⁶ and whether giving preclusive effect to the prior decision will work some unfairness on the defendant.³⁷

Under the auspices of the "unfairness" standard, courts have held that a change in "facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues."³⁸ Thus, where the passage of time produces a change of circumstances, factual determinations made in one time period may "not necessarily [serve as] an estoppel as to other time periods."³⁹ Recognizing the potentially erosive effect of the "changed circumstances" rule on the doctrine of collateral estoppel, however, courts have allowed evidence of changed circumstances to obviate the use of collateral estoppel only when the factual situation has been "vitally altered" between the time of the first and second actions.⁴⁰

The problem remains, however, as to what method the courts should use to decide whether a change in circumstances warrants rejection of the use of offensive estoppel. Consistent with the grant of broad discretion favored in *Parklane*,⁴¹ commentators have embraced a flexible approach to the allocation of the burden of proof in the "changed circumstances" area.⁴² Where the probability of meaning-

³⁴ *Id.* at 330-31.

³⁵ *Id.* at 331. "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive estoppel." *Id.*

³⁶ Flanagan, *supra* note 25, at 55-56, 59.

³⁷ Shimman v. Frank, 625 F.2d 80, 89 (6th Cir. 1980).

³⁸ Montana v. United States, 440 U.S. 147, 159 (1979).

³⁹ International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 455 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963).

⁴⁰ *E.g.*, Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 846 (3d Cir. 1974). *See also* Fleer Corp. v. Topps Chewing Gum, Inc., 501 F. Supp. 485 (E.D. Pa. 1980). "Circumstances in the baseball card market have changed *dramatically* and *materially* since 1965, and the defense of collateral estoppel is therefore unavailable to Topps." *Id.* at 513 (emphasis added).

⁴¹ *See supra* note 35 and accompanying text.

⁴² RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982) provides:

Sometimes, there is a lack of total identity between the matters involved in the two proceedings because the events in suit took place at different times. In some such instances, the overlap is so substantial that preclusion is plainly appropriate. . . . In other instances the burden of showing changed or dif-

ful change is very low, a court may be justified in refusing to allow any attempt to prove changed circumstances; conversely, where the probability of change is extremely high, the court may refuse to give the first finding any preclusive effect whatever.⁴³ In cases lying between these extremes, commentators have suggested that the prior determination be given a presumptive effect of varying weight:

The greatest presumptive effect is to presume that the facts were as found, and to reject preclusion only if it can be shown that new and different facts have in fact occurred since the time of the first trial. . . . [L]ess effect could be given by considering preclusion only upon some preliminary showing that probably there has not been any change in the fact setting.⁴⁴

Given the wide discretion available to courts in determining the proper allocation of the burden of proof, cases in which this issue has played a significant role have been the exception rather than the rule. *Dracos*, however, is a case where this problem was a major issue.

In deciding the collateral estoppel issue in *Dracos*, the court emphasized the traditional concepts stressed in *Parklane*: broad discretion vested in the trial court and flexible application of collateral estoppel governed by overriding considerations of fairness.⁴⁵ In examining the possibility that a substantial change in circumstances had rendered offensive estoppel inapplicable, the Fourth Circuit found persuasive the district court's reasoning that the "earlier adjudication reflected the status of the defendant only as it existed several years prior to the accrual of the [present] cause of action" ⁴⁶ The court further found that the shipping industry was "inherently subject to change" and represented a "changing factual situation that may require the choice of American law . . . one year but may not require the same choice some years later."⁴⁷ Given this

ferent circumstances should be placed on the party against whom the prior judgment is asserted. . . . In still other instances, the bearing of the first determination is so marginal because of the separation in time and other factors negating any similarity that the first judgment may properly be given no effect.

Id.

⁴³ 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4417, at 160 (1981).

⁴⁴ *Id.* In *Dracos* the dissent appears to embrace the former position while the majority seems to prefer the latter.

⁴⁵ *Dracos*, 762 F.2d at 353.

⁴⁶ *Id.* at 352.

⁴⁷ *Id.* at 353. The dissent challenged the majority's factual analysis concerning Hellenic and the shipping industry. Judge Murnaghan argued that the record was void of convincing evidence that the circumstances surrounding Hellenic's operation had in fact changed. He claimed that the majority had based its refusal to give preclusive effect to *Rhoditis* on the "mere possibility of change—a truism [which] should [not] be allowed to render meaningless a factual finding reached a dozen years before after full, fair and vigorous litigation which, at least as likely as not, is dispositive of the case currently before us." *Dracos*, 705 F.2d at 1398-99 (Murnaghan, J., dissenting).

There is some indication that a vigorous examination of the factual data surrounding Hellenic's operations at the time Nicholas Dracos died might have revealed evidence suffi-

propensity for change, the court held that the district court had acted within its discretion in refusing to give preclusive effect to *Rhoditis*.⁴⁸

While applauding the district court's flexible use of discretionary authority, the court of appeals adopted a rather rigid approach to allocating the burden of proof on the issue of "changed circumstances." Because the choice of law issue was deemed to be essentially jurisdictional in nature⁴⁹ and plaintiff bore the burden of proving that the district court was competent to hear the case,⁵⁰ the court held the burden was on plaintiff to prove that the facts as established in *Rhoditis* had not been altered substantially by the passage of time and events.⁵¹ The court thus adopted a restrictive form of presumption—the prior litigation would be presumed to have *no* estoppel effect unless plaintiff came forward with proof that the factual situation remained substantially the same from one action to the next. Rather than examining objective factual evidence regarding

cient to warrant application of U.S. law. Although the court of appeals makes reference to the district court's examination of evidence, *Dracos*, 762 F.2d at 351, there is little explication of the exact information culled from this review. In *Papaioannou*, however, the court undertook a thorough study of evidence concerning Hellenic's operations. The court found:

Although a greater number of the *Lauritzen-Rhoditis* factors point to Greece, the more significant . . . factors point to the United States. . . . [T]he accident occurred in the port of New York. Furthermore, the allegiance of the shipowner [Gregory Callimanopoulos, Pericles' son and successor] is a mixture of Greek and American. . . . Plaintiff has shown substantial business activity by Hellenic in this country. Plaintiff has also proved that Hellenic and Gregory have a base of operations in the United States and that Hellenic has substantial dealings in commerce affecting the United States. Under these circumstances . . . this court, applying *Lauritzen* and *Rhoditis*, finds that plaintiff has carried his burden of showing by a preponderance of evidence that jurisdiction exists in this matter.

Papaioannou, 569 F. Supp. at 728.

⁴⁸ *Dracos*, 762 F.2d at 353.

We do not hold that the approach taken by the district court . . . is obligatory in each case, only that the approach it took was within its discretion. . . . [I]f the facts . . . are inherently subject to change, then a district court may be justified in giving the prior finding no preclusive effect.

Id.

⁴⁹ The Supreme Court has objected to this categorization of the issue.

As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

Lauritzen, 345 U.S. at 575. See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). "Petitioner asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights." *Id.* at 359.

⁵⁰ *Dracos*, 762 F.2d at 350.

⁵¹ *Id.* at 353.

Unless it is shown that the condition found at a first trial is so permanent as to be unlikely to be disturbed, then we think offensive collateral estoppel may not be used with respect to that condition unless it be shown that the facts upon which the condition was based continued to exist.

Id.

the nature of the shipping industry and its propensity to change substantively over time, the court relied on its "judicial ability to bend common experience to assessing the relative pace and probability of factual change"⁵² within the industry.

The dissent objected to the court's allocation of the burden of proof, arguing that the *Rhoditis* decision ought to have been given a *positive* presumptive effect. Under this approach, the facts as found in *Rhoditis* would be presumed to be extant, and the burden would be on Hellenic to rebut this presumption by introducing evidence of changed circumstances. The majority approach, the dissent urged, forced plaintiff "to remake, if indeed not reinvent, the entire wheel," and "carried the concept of 'changed circumstances' to an extreme that saps the collateral estoppel doctrine of its vitality."⁵³

Dracos is thus part of a trend toward recognizing the limitations of the offensive use of collateral estoppel and restricting its application. As experience with this doctrine has grown, criticism of offensive estoppel has mounted.⁵⁴ Courts have been reluctant to allow collateral estoppel in complex litigation in which the subject matter is perceived to be inherently dynamic.⁵⁵ That there is controversy concerning application of the doctrine and therefore much reliance on the use of discretionary judgment is hardly surprising given the recency of *Parklane's* authorization of offensive estoppel and the potential for unfairness to litigants inherent within its operation.⁵⁶ Viewed within this framework, then, the decision in *Dracos* should not come as unexpected.

The reluctance of the court in *Dracos* to allow use of offensive estoppel could have important ramifications. If courts follow the approach taken in *Dracos* and place on plaintiff the burden of proving that circumstances have not changed before granting preclusive effect to a prior decision, a shift in the focus of the courts will occur. The focus of most courts faced with the problem of issue preclusion currently is upon "peripheral" issues such as "what was litigated in the first case, the sufficiency of the prior litigation, and whether it should be applied in the present case."⁵⁷ Forcing the plaintiff to prove the continuing validity of factual determinations shifts the focus of the court back to the "merits of the common issues."⁵⁸ Whether such a shift is desirable is arguable. While increased focus by the courts on the "merits" intuitively may be appealing, such a

⁵² 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 4417, at 162.

⁵³ *Dracos*, 705 F.2d at 1398 (Murnaghan, J., dissenting).

⁵⁴ See Flanagan, *supra* note 25.

⁵⁵ See Green, *The Inability of Offensive Collateral Estoppel To Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984).

⁵⁶ Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 634 (1980).

⁵⁷ Flanagan, *supra* note 25, at 59.

⁵⁸ *Id.* at 55-56.

shift would defeat the purpose of collateral estoppel—saving party and judicial resources by preventing relitigation of issues already decided in full and fair adjudication.

The *Dracos* decision is thus troubling for a variety of reasons. The majority decision regarding the burden of proof, based on conceptions of “judicial notice” of the inherently dynamic nature of the shipping industry, is open to criticism. The court advanced little in the way of empirical, objective evidence that the industry is generally volatile, or that Hellenic demonstrated a propensity for continual substantive change.⁵⁹ Lacking such evidence, the court’s decision to place on plaintiff the heavy burden of proving lack of change appears unreasonable.

Moreover, the decision to allocate the burden of proof in this manner seems to be rooted in a misapprehension of the choice of law issue as a jurisdictional question.⁶⁰ By so categorizing the issue, the court intertwined the burdens of proving that the court had jurisdiction, that U.S. law should govern, and that *Rhoditis* should have been given preclusive effect. This intermingling of issues led the court to the fallacious conclusion that if plaintiff must prove jurisdiction, and if jurisdiction depends on choice of law, and if choice of law is the issue plaintiff seeks to estop defendant from relitigating, then plaintiff bears the burden of proving the appropriateness of the estoppel. The court missed the logical conclusion that if the issue of preclusion was first decided separately and independently from the question of jurisdiction, the choice of law issue would also be disposed of and plaintiff might thereby meet the court’s burden of establishing jurisdiction.

The foregoing discussion leads to several conclusions. First, the question of the burden of proof on the estoppel issue must be decided solely on the basis of an examination relating to the fairness of allowing preclusion in light of the possibility of changed circumstances, and *not* on the basis of where the burden of proof concerning the issue sought to be precluded lies. Second, only when the evidence of the static or dynamic nature of the facts is clearcut should the court *absolutely* deny or compel collateral estoppel rather than giving the prior adjudication some sort of presumptive effect. Third, given that the factual situation in *Dracos* was the subject of dispute and open to disparate interpretation,⁶¹ the allocation of the burden of proof on the estoppel question should have been based on a more thorough examination of the factual data rather than on a conception of “judicial notice” of the nature of the shipping industry in general and the operations of Hellenic in particular.

⁵⁹ *Dracos*, 705 F.2d at 1399 (Murnaghan, J., dissenting).

⁶⁰ See *supra* note 50 and accompanying text.

⁶¹ See *supra* note 48 and accompanying text.

The approach advocated by the dissent⁶²—giving *Rhoditis* a positive presumptive estoppel effect that Hellenic might rebut by producing sufficient evidence of changed circumstances—meets the goal of treating the parties to the subsequent litigation fairly while retaining the advantages of judicial economy cited as crucial in *Parklane*. This approach would place on Hellenic, the party most likely to have access to such information, the burden of producing evidence concerning the company's business contacts, base of operations, and allegiance of ownership.⁶³ Moreover, the goal of judicial economy would be served because plaintiff would not be forced to relitigate the choice of law issue unless there was an actual need to do so, based on the introduction of empirical, documentary evidence of a substantive nature.⁶⁴ The better approach would therefore have been to remand the case to the district court for a determination of the choice of law issue using the presumption advocated by Judge Murnaghan in his dissent.

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⁶² See *supra* note 53 and accompanying text.

⁶³ *Dracos*, 705 F.2d at 1401 (Murnaghan, J., dissenting).

⁶⁴ *Id.*